No.

IN THE

Supreme Court of the United States

TARKWIN ENRICK, PETITIONER

v.

KEVIN M. KORCZAK AND PHILIP J. SCHMIDT, as the Administrator of the Estate of Frances L. Korczak and Babe Doe Korczak,

and

FAIZEL SEDEMAN, a/k/a FAIZEL FEDEMAN, THERMAL SOLUTIONS, INC., CRC-EVANS PIPELINE INT'L, INC., AND PIPELINE INDUCTION HEAT LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the final order vacating the judgment inflict upon Petitioner, Tarkwin Enrick, a sufficiently tangible injury to give him standing under Article III of the Constitution for his appeal.

Does Judge Hibbler's criticism of the judgment on the jury verdict create a special circumstance which would counsel against the application of offensive collateral estoppel and which would render preclusion inappropriate or unfair.

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The opinion of the Court of Appeals for the Seventh Circuit is reported at Kevin Korczak et al. v. Faizel Sedeman et al., Appeal of Tarkwin Enrick, no. 05-2698 and is reprinted in Appendix A to the Petition.

The District Court final order entered on June 3, 2005, approving the settlement agreement and vacating the judgment is unreported.

JURISDICTION

The Court of Appeals entered it decision on October 5, 2005. This Court had jurisdiction under 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

This case involved provisions of Fed R. Civ. P. 24(b)(2) for Permissive intervention.

> when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention

will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

The underlying action arose from an automobile accident which occurred on November 11, 2001 involving two vehicles, one driven by the Plaintiff, Kevin M. Korczak, and the other driven by the Defendant, Faizel Sedeman. The intervenor, Tarkwin Enrick, was a passenger in the vehicle operated by the Defendant, Faizel Sedeman. Korczak filed a lawsuit under case no. 01C9739 before the Honorable Judge Hibbler alleging that the accident was Sedeman's fault.

As a result of their injuries sustained in the accident, Faizel Sedeman and Tarkwin Enrick filed a lawsuit against Kevin Korczak in the Northern District of Illinois, Eastern Division under case no. 03C7899, before Judge Gotschall. Faizel Sedeman and Tarkwin Enrick previously filed before Judge Hibbler a Motion to Consolidate their lawsuit (case no. 03C7899) with Korczak (case no. 01C9739) and it was denied.

Judge Gotschall dismissed the lawsuit (case no. 03C7899) filed by Sedeman and Enrick for lack of diversity jurisdiction. Pursuant to the applicable Illinois law, Sedeman and Enrick refiled their action in state court with a jury demand and their state action is pending in Will County, Illinois.

The Korczak action proceeded to trial and the jury verdict was rendered. The jury found that the Defendant, Faizel Sedeman, was 55% at fault and the Plaintiff, Kevin M. Korczak, was 45% at fault. Judge

Hibbler entered Judgment on the Jury Verdict on October 22, 2004.

The complaint filed by Korczak in case no. 01C9739 and the complaint filed by Sedeman and Enrick in state court disclosed that both lawsuits arose out of a two vehicle accident that occurred on November 11, 2001 in the township of DuPage in Will County, Illinois. In the first lawsuit, Korczak alleges that the accident was Sedeman's fault; in the second lawsuit pending in state court, Sedeman and his passenger Enrick allege the accident was Korczak's fault.

Subsequent to the entry of the judgment of the jury verdict, Plaintiff, Korczak, and certain defendants filed timely post judgment motions before Judge Hibbler requesting a new trial. During the pendancy of the post trial motions, Plaintiff, Korczak, filed a Motion to Approve Settlement Agreement and Vacate Judgment entered on the Verdict and set the matter for a hearing before Judge Hibbler on June 3, 2005. Tarkwin Enrick, filed an Amended Motion to Intervene which was entered and continued to June 3, 2005.

In his amended Motion to Intervene, Enrick requested the judgment to stand to establish the liability of Korczak in his state Court action and relied on the offensive use of collateral estoppel to preclude Korczak from relitigating the issue of his negligence.

Judge Hibbler granted Enrick's Amended Motion to Intervene for the limited purpose to oppose Korczak's Motion to Vacate the Judgment entered on the Jury Verdict.

After oral argument on the Korczak Motion, Judge Hibbler approved the settlement agreement and granted the Motion to Vacate the Judgment entered on the Jury Verdict. During his ruling on the motion, Judge Hibbler recited a list of errors which would support a new trial and further stated that he would be inclined to grant a new trial, if the case had not settled.

The Judgment on the jury verdict found the percentage of negligence attributable solely to the Plaintiff, Kevin Korczak is 45% and it reduced the damages sustained by Kevin Korczak by the percentage of negligence (45%) attributable to him.

The total jury verdict for the Plaintiff, Kevin Korczak, and his two minor children, Randi and Matthew, was in the amount of $3,709,000.00. After the reduction of the jury verdict for the percentage of negligence attributable to Kevin Korczak, the total jury award for Korczak and his two minor children was in the amount of $3,083,950.00.

The settlement agreement which vacated the judgment on the jury verdict provided for a total settlement amount of $3,100,000.00 payable to Korczak and his two minor children. The jury award in the amount of $3,083,950.00 and settlement amount are almost identical.

Specifically the jury awarded $1,000,000.00 to each minor child for the loss of their mother and $50,000.00 for each minor child for the loss of their unborn sibling. The total jury award for the two minor children is in the amount of $2,100.00.00. After reduction for attorney's fees and pro-rata costs, the

jury award to the minor children is in the amount of $1,356,030.00.

In addition to the jury award to the minor children for the loss of their mother, the Illinois Survival Action provides a damage award for the medical expenses and pain and suffering sustained by the decedent, Frances L. Korzcak. The jury awarded the amount of $220,000.00 for the survival action for Frances L. Korczak. If she died intestate, under Illinois law her minor children are entitled to 50% of the jury award. The jury award for the minor children under the Illinois survival action would be in the amount of $110,000.00. After the reduction for attorney's fees and costs, the minor children would then receive an additional amount of $71,042.00.

The settlement agreement approved by Judge Hibbler provided for a structured settlement for both minor children. The cost of the structured annuity for each minor child is in the amount of $600,000.00. After the payment of attorney's fees and costs, the settlement agreement provides the amount of $1,200,00.00 for both minor children.

The settlement agreement substantially reduces the amount of money the jury awarded for each of the two minor children. The post judgment motions for a new trial and the discussion by Judge Hibbler in open court about the "fairness" of the jury verdict never mentioned the damage award to the two minor children. The settlement agreement purportedly was to correct the inequities of the jury award.

If, in fact, the jury apportionment of 45% was "unfair", the settlement agreement should have provided for more gross dollars to offset the jury's reduction of Korczak's award due to his comparative negligence. Instead, the settlement agreement takes away a substantial amount of money from the minor children to increase Korczak's jury award.

Tarkwin Enrick, as an intervenor, has no standing to challenge the settlement agreement. He can only oppose the motion to vacate the judgment on the jury verdict. But, if the jury verdict stands, it would have nullified the terms of the settlement agreement.

In his Amended Motion to Intervene, Tarkwin Enrick, states that collateral estoppel applies when four conditions are met: (1) the issue to be precluded is the same as the issue in the prior case; (2) the issue must have actually been decided; (3) the decision on the issue must have been necessary to the court's judgment; and (4) and the party against whom the estoppel is asserted must have been fully represented in the prior litigation. *Meyer v. Ridgon, 36 F. 3d 1375, 1379 (7th Cir 1994). Chicago Trust Drivers, Helpers & Warehouse Union (indep.) Pension Fund v. Century Motion Freight, Inc., 125 F. 3d. 526, 530 (7th Cir. 1997).*

Judge Hibbler agreed that all four conditions for collateral estoppel are met and granted Tarkwin Enrick's Amended Motion to Intervene. Tarkwin Enrick, as a party, filed a Notice of Appeal on June 3, 2005, of the final order vacating the judgment entered on October 24, 2004. The Seventh Circuit dismissed the

appeal because Enrick did not establish standing to pursue this appeal.

REASONS FOR GRANTING THE PETITION

Judge Posner in his opinion had concerns about whether recognizing standing in such a case would make it even more difficult that it is to settle cases, by making the intervenor in effect another party to the settlement negotiations. (5a). The Petitioner, Tarkwin Enrick, respectfully disagrees with this contention because his opposition as an intervenor to the "settlement negotiations" could have prevented the implementation of a settlement agreement which was not in the best interest of the minor children.

The Seventh Circuit stated that a party has a right to appeal from a judgment that inflicts a sufficiently tangible injury on him to give him standing under Article III of the Constitution to sue. (3a). The Court concluded Tarkwin Enrick would receive no benefit from the loss of the preclusive effect of the judgment. (8a).

The Ninth Circuit has held that a third party who relies on the preclusive effect of a judgment for offensive collateral estoppel has standing to challenge the decision to vacate the judgment. *American Games Inc. v. Trade Produces, Inc., 142 F. 3d. 1164, 1167 (9th Cir. 1998).*

> "American Games stands to benefit directly from the preclusive effect of the district court's decision on those issues if that court's vacatur decision is reversed. The actual or threatened

> injury to American Games is the loss of the preclusive force of the district court's decision. That loss is traceable to the district court's vacatur order, and is redressable by favorable action on appeal should this court decide to reverse that vacatur order, restoring the decision. Thus, American Games satisfies the constitutionally required minima for standing in an Article III court." (emphasis added.) Id.

The Seventh Circuit had doubts about the soundness of the Ninth Circuit's decision in *American Games* but concluded that it need not decide to resolve whether the *American Games* decision is wrong in order to deny standing to Tarkwin Enrick on his appeal. (5a). In effect, the Seventh Circuit reasoning to deny standing to Tarkwin Enrick is inconsistent with the decision of the Ninth Circuit in *American Games*. The Seventh Circuit attempts to distinguish the facts in *American Games* from the facts in Tarkwin Enrick's appeal because his case is "peculiar" due to Judge Hibbler's comment in open court that the judgment was unsound. (7a).

To accomplish its objective to distinguish the Ninth Circuit decision in *American Games*, the Seventh Circuit cites the case of *Crowder v. Lash, 687 F. 2d 996 (7th Cir. 1982)* for the proposition that the judgment entered by Judge Hibbler should not be given collateral estoppel effect if "any special circumstances exist which would render preclusion inappropriate or unfair". (7a). The Seventh Circuit argues that Judge Hibbler's criticisms of the judgment would have dissuaded the judge in the second law suit from giving the judgment collateral estoppel effect.

The Seventh Circuit excerpted one sentence from its decision in *Crowder* to support the application of the "special circumstances" to preclude Enrick's reliance on offensive collateral estoppel. (7a)

But the remaining paragraph in the *Crowder* opinion defines the term "special circumstances" and its relevant applications.

> "Special circumstances which would counsel against the application of offensive collateral estoppel include the stance of a "wait-and-see" plaintiff who could easily have participated in the previous action but, instead, held back to await the outcome of that action; a lack of incentive on the part of the defendant to fully and vigorously litigate the earlier action; an inconsistency between the judgment relied upon as a basis for the estoppel and any prior judgment in favor of the defendant; and the existence, in the second proceeding, of procedural opportunities unavailable in the first action, that would be likely to cause a difference result. *Parklane Hosiery*, 439 U.S. at 331-32, 99 S.Ct. at 651-52. The Supreme Court, in *Parklane Hosiery*, also stated that 'the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.' 439 U.S. at 881, 99 S.Ct. at 651." Id. at 1010.

None of the special circumstances enumerated by this Court in *Parklane Hosiery* and followed by the

Seventh Circuit in *Crowder* remotely apply to Tarkwin Enrick's case. In the *Parklane Hosiery* case, this Court found that the aforementioned special circumstances were not applicable and allowed the use of offensive collateral estoppel. Likewise, in Enrick's case, none of the *Parklane Hosiery* factors counseled against the application of offensive collateral estoppel. First, intervenor Enrick, did not w it to see the result in the prior case before filing his lawsuit. On the contrary, Enrick attempted to consolidate his lawsuit with the prior action but it was denied. Enrick's actions could hardly be labeled opportunistic.

Furthermore, Plaintiff, Korczak, successfully persuaded the jury to find him less than 50% at fault thereby recovering a significant amount of money from his jury award. Korczak had every incentive to vigorously contest his percentage of fault in order to enhance his recovery. Lastly, Korczak, could have requested a hearing on his post judgment motion for a new trial and he had the right to appeal the jury verdict finding him 45% at fault. He chose to forego his post judgment remedies.

In re Memorial Hospital, 862 F. 2d 1299 (7th Cir. 1988) the Seventh Circuit in pertinent part held as follows:

> "When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property. We

> would not approve a settlement that requires us to publish (or depublish) one of our own opinions, or to strike a portion of its reasoning. To the extent an opinion permits the invocation of *Parklane*, it may have great value to strangers-a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell. If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision an outcome our approach encourages." (emphasis added) Id at p. 1302.

Petitioner, Tarkwin Enrick, invokes this Court's opinion in *Parklane Hosiery* and followed by the Seventh Circuit in *In re Memorial Hospital* to support that the preclusive effect of the judgment entered by Judge Hibbler has a great value to him and the final order vacating the judgment inflicts upon him a sufficiently tangible injury to give him standing under Article III of the Constitution for his appeal.

CONCLUSION

Grant of this petition is essential. Every recognized reason for a review by this Honorable Court is manifest in this case.

The Seventh Circuit has severely limited the application of the holding and stare decisis effect of this Court's decision in *Parklane Hosiery*. The "special circumstances" defined by this Court in *Parklane Hosiery* to preclude a third party from relying on the preclusive effect of a judgment to support the

application of offensive collateral estoppel has been significantly broadened by the Seventh Circuit.

The Seventh Circuit added a new special circumstance which would preclude the application of offensive collateral estoppel any time a trial judge criticizes the "fairness" of the judgment. In effect, the Seventh Circuit has greatly eroded the value of a prior judgment for a third party such as your Petitioner, Tarkwin Enrick.

The Ninth Circuit in *American Games* has addressed the identical issue raised in this appeal. The Seventh Circuit dismissal of this appeal for lack of standing is completely inconsistent with the holding of the Ninth Circuit in *American Games.* Petitioner, Tarkwin Enrick, satisfied the constitutionally required minima for standing under Article III based on the Ninth Circuit holding in *American Games.*

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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No. 05-2698

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN KORCZAK, et al., Plaintiffs-Appellees,

v.

FAIZEL SEDEMAN, et al., Defendants-Appellees.

APPEAL OF TARKWIN ENRICK.

August 3, 2005, Submitted

October 5, 2005, Decided

COUNSEL: For KEVIN KORCZAK, Estate of Baby Doe Korczak, PHILIP J. SCHMIDT, as the Administrator of the Estate of Francis L. Korczak, FRANCES L. KORCZAK, BABY DOE KORCZAK, Plaintiffs - Appellees: John C. Ambrose, AMBROSE & CUSHING, Chicago, IL, USA.

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For THERMAL SOLUTIONS INCORPORATED, Defendant - Appellee: Howard K. Priess, TRESSLER, SODERSTROM, MALONEY & PRIESS, Chicago, IL, USA.

For CRC-EVANS PIPELINE INTERNATIONAL, INCORPORATED, PIPELINE INDUCTION HEAT LIMITED, INTERNATIONAL HEAT

TREATMENT SERVICES, Defendants - Appellees: John P. Prusik, PRUSIK, SELBY & DALEY, Chicago, IL.

For TARKWIN ENRICK, Intervenor - Appellant: Robert J. Biswurm, BISWURM & ASSOCIATES, Chicago, IL.

JUDGES: Before BAUER, POSNER and WOOD, Circuit Judges.

OPINION BY: POSNER

OPINION: POSNER, *Circuit Judge.* The underlying suit, which we'll call suit number 1, is a diversity suit, governed by Illinois law, for damages arising from an automobile accident. A jury determined that both drivers had been negligent, and the judge entered judgment against them in accordance with the verdict. Enrick, a passenger in one of the cars, brought a separate suit, suit number 2, against the driver of the other car, one of the defendants in suit number 1. The parties to number 1 decided to settle, and pursuant to the terms of the settlement they asked the judge to vacate the judgment in their suit. Enrick asked the judge to let him intervene to oppose the settlement, because he wanted the judgment to stand so that he could use it to establish the liability of the driver of the other car in suit number 2, his suit against that driver--use it, that is, as "offensive collateral estoppel," to preclude the driver from relitigating the issue of his negligence. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979); Chicago Truck Drivers, Helpers & Warehouse Union Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526, 530-

31 n. 3 (7th Cir. 1997). The judge permitted Enrick to intervene for the limited purpose of challenging the provision of the settlement that required the judgment in suit number 1 to be vacated, but after listening to his pitch decided to approve the settlement, vacate the judgment, and dismiss the suit. The judge, who had misgivings about the instructions that he had given the jury, said that if the case had not been settled he would almost certainly have granted the defendants a new trial.

Enrick has appealed from the judge's order vacating the judgment. Doubting whether we have jurisdiction of the appeal, we asked the parties to brief the question.

To intervene in a suit is to become a party to it, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987); Diamond v. Charles, 476 U.S. 54, 68, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994), and a party has a right to appeal from a judgment that inflicts a sufficiently tangible injury on him to give him standing under Article III of the Constitution to sue. Article III has been interpreted to impose the requirement of standing on all stages of a federal litigation, including appeals. E.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n. 22, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997); United States Parole Commission v. Geraghty, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980).

The opportunity to use a judgment in a suit to which one is not a party to gain an advantage in a suit to

which one is a party is valuable, but the denial of the opportunity is not a sufficient injury to confer standing. The principle is well established in cases in which the opportunity is merely to use the judgment (or rather, in the usual case, the opinion accompanying the judgment) as a precedent that might persuade a court in a subsequent case. Boston Tow Boat Co. v. United States, 321 U.S. 632, 88 L. Ed. 975, 64 S. Ct. 776 (1944); Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1513 (11th Cir. 1996). Of course precedent has a social value; that was one basis on which the Supreme Court held in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26-27, 130 L. Ed. 2d 233, 115 S. Ct. 386 (1994), that a judgment should not be vacated just because a settlement afterwards mooted the case and thus precluded further judicial review. But *U.S. Bancorp* did not overrule *Boston Tow Boat*; there are many socially valuable goods that no one has a sufficient interest in to enable a suit to secure the good.

One case holds, however, that a person who would like to use a judgment for purposes of offensive collateral estoppel has standing to challenge the vacation of that judgment. American Games, Inc. v. Trade Products, Inc., 142 F.3d 1164, 1167 (9th Cir. 1998). The court's entire reasoning is contained in a single, short sentence: "American Games stands to benefit directly from the preclusive effect of the district court's decision on those issues if that court's vacatur decision is reversed." We have our doubts about the soundness of the decision. Considering that the use of a judgment as offensive collateral estoppel in a subsequent suit is discretionary with the court in that suit, e.g., Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 331, it is hard to see why, if the precedential effect of a decision shouldn't be a

sufficiently tangible interest to confer standing, the possibility of using the decision to foreclose relitigation of a particular issue should be. And we are concerned that recognizing standing in such a case would make it even more difficult than it is to settle cases, by making the intervenor in effect another party to the settlement negotiations. There is no doubt a price at which the parties to the present case could induce Enrick to go away and leave them alone, but a three-party negotiation is more cumbersome than a two-party one.

Even if (as we need not decide to resolve this appeal) the *American Games* decision is wrong, the predominant view is that intervention does not require that the intervenor have an interest sufficient under Article III to entitle him to sue, since the court's jurisdiction is adequately supported by the fact that the original parties must have standing, as otherwise the suit could not continue. Purcell v. BankAtlantic Financial Corp., supra, 85 F.3d at 1512; Associated Builders & Contractors v. Perry, supra, 16 F.3d at 690; Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991). There is dissent from this position, however, Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996); Southern Christian Leadership Conference v. Kelley, 241 U.S. App. D.C. 340, 747 F.2d 777, 779 (D.C. Cir. 1984); cf. United States Postal Service v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978), and we treated the issue as an open one in Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 946 (7th Cir. 2000).

If intervention always meant that the intervenor became a party with *all* the rights the original parties had, so that if the party on whose side he intervened dropped out of the case he could take his place and

continue the litigation to judgment, he would have to show that his interest in the suit was sufficient to confer standing under Article III. Such a conclusion would be implicit in the rule mentioned earlier that jurisdiction must continue throughout a litigation. It is not enough that there was jurisdiction originally but it lapsed before judgment was entered; when it lapses, the suit must be dismissed.

But "intervention" can be and is used more broadly (or loosely) to denote a situation in which the resolution of a dispute can be expedited or made more accurate or otherwise improved by allowing someone to enter the litigation, conduct discovery, examine and cross-examine witnesses, and otherwise disport himself as a party would, or else to participate in a more limited capacity, as in the present case. Whether such participations are called "intervention" or something else, and the participants are called "parties" (invariably they are, if permitted to intervene, however limited a participation the judge authorizes) or something else, such participation is within the power of a district judge to allow if he has a reasonable basis in judicial expedience to do so. See, e.g., Jessup v. Luther, 227 F.3d 993, 997-98 (7th Cir. 2000); Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994); Walsh v. Walsh, 221 F.3d 204, 213 (1st Cir. 2000); United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990). But if the intervenor does not have the kind of interest that confers standing, then, even if he is called a "party," and even if he *is* a party for other purposes, he cannot force the litigation to judgment or take an appeal. Diamond v. Charles, supra, 476 U.S. at 68-69; Transamerica Ins. Co. v. South, 125 F.3d 392, 396 (7th Cir. 1997); Harris v.

Amoco Production Co., 768 F.2d 669, 675-76 (5th Cir. 1985) (permissive intervenor); McKay v. Heyison, 614 F.2d 899, 907 (3d Cir. 1980) (same). The other side of this coin is that a member of a class in a class action suit, even if not a named party, can challenge a settlement that will bind him. Devlin v. Scardelletti, 536 U.S. 1, 153 L. Ed. 2d 27, 122 S. Ct. 2005 (2002). He has a tangible interest. In short, the label "party" does not determine standing.

This analysis may seem to make the question whether the possibility of using a judgment as offensive collateral estoppel in the intervenor's suit is sufficient to confer standing on the intervenor inescapable in the present case. But the case is peculiar because the judge, while vacating the judgment because the parties to suit number 1 wanted him to, made clear that he thought the judgment unsound and therefore that he would have set it aside quite apart from the settlement. A vacated judgment is not a permissible basis for collateral estoppel. E.g., Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993) (Illinois law); Pontarelli Limousine, Inc. v. City of Chicago, 929 F.2d 339, 340 (7th Cir. 1991) (same).

Even if the judge would not have set aside the judgment--for it is merely highly likely, and not certain, that he would have done so--his criticisms of the judgment would undoubtedly have dissuaded the court in suit number 2 from giving the judgment collateral estoppel effect; for a judgment must not be given such effect if "any special circumstances exist which would render preclusion inappropriate or unfair." Crowder v. Lash, 687 F.2d 996, 1010 (7th Cir. 1982). The fact that a loss or other harm on which a suit is based (here, the

loss of Enrick's opportunity to use the judgment in suit number 1 against the defendant in number 2) is probabilistic rather than certain does not defeat standing. E.g., North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991). But the probability must not be *too* close to zero. So remote is the prospect that Enrick could have derived a benefit in suit number 2 from vacating the settlement in suit number 1 that we conclude that he has not established standing to pursue this appeal. The appeal is therefore

DISMISSED.

Case No. 01 C 9739

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

KEVIN M. KORCZAK AND PHILIP J. SCHMIDT, as the Administrator of the Estate of Frances L. Korczak and Babe Doe Korczak, Plaintiffs,

v.

FAIZEL SEDEMAN, a/k/a FAIZEL FEDEMAN, THERMAL SOLUTIONS, INC., CRC-EVANS PIPELINE INT'L, INC., AND PIPELINE INDUCTION HEAT LTD., Defendants.

DOCKET ENTRY TEXT 6/3/2005

Plaintiff's agreed amended motion to approve settlement agreement and vacate judgment entered on the verdict is granted for the reasons stated in open court. Petitioner's amended motion to interene is granted for the limited purposes of addressing the Court as to the Court's action in allowing the vacation of the jury's verdit. All pending motions and dates are terminated as moot. The case remains terminated.